

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>20</sup> and Rule 19b-4(f)(2)<sup>21</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MIAX-2021-23 on the subject line.

*Paper Comments*

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-MIAX-2021-23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MIAX-2021-23 and should be submitted on or before July 6, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021-12476 Filed 6-14-21; 8:45 am]

BILLING CODE 8011-01-P

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-92132; No. SR-NYSEArca-2021-51]

**Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Modifying the NYSE Arca Options Fee Schedule**

June 9, 2021.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on June 4, 2021, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>22</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to modify the NYSE Arca Options Fee Schedule ("Fee Schedule") regarding the Customer Posting Credit Tiers and the Customer Incentive Program. The Exchange proposes to implement the fee change effective June 4, 2021.<sup>4</sup> The proposed rule change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this filing is to amend the Fee Schedule to make modifications to the Customer Penny Posting Credit Tiers, Customer Incentive Program, and Customer Posting Credit Tiers in Non-Penny Issues.

Currently, the Fee Schedule provides that OTP Holders and Firms ("OTP Holders") can qualify for per contract credits applied to options transactions based on meeting certain minimum volume thresholds from Customer posting interest in Penny issues and Non-Penny issues and also qualify for an additional credit by meeting specified incentive volume levels. The Exchange proposes to make modifications to certain of its incentive programs as set forth below.

The Exchange proposes to implement the fee change effective June 4, 2021.

Customer Penny Posting Credit Tiers (the "Penny Tiers")

The Exchange proposes to make the following modifications to the Penny Tiers, which provide per contract

<sup>4</sup> The Exchange originally filed to amend the Fee Schedule on June 1, 2021 (SR-NYSEArca-2021-48) and withdrew such filing on June 4, 2021.

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>21</sup> 17 CFR 240.19b-4(f)(2).

credits on executions of Customer posted interest in Penny Issues. First, the Exchange proposes to modify one of the alternative minimum volume thresholds to achieve Penny Tier 4, eliminate Penny Tier 5, and modify both alternative minimum volume thresholds to achieve Penny Tier 7 (which will also be renumbered to Tier 6). One of the two alternative means of achieving current Penny Tier 4 is for OTP Holders to execute at least 0.85% of TCADV from posted interest in Penny Issues, all account types. The Exchange is proposing to modify this alternative threshold to require at least 0.30% of TCADV from Customer posted interest in all issues, not including Professional Customer interest, plus executed ADV of 0.60% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market. The Exchange is not proposing to modify the Penny Tier 4 per contract credit of (\$0.47).

The Exchange's proposed changes to Penny Tier 4 would modify the qualification threshold for options order flow such that the qualifying volume would be restricted to posted Customer interest (not including Professional Customer interest) but would apply to posted Customer volume in all issues (not just Penny Issues). The proposed change excludes Professional Customer interest and is designed to attract Customer order flow, which provides benefits distinct from Professional Customer volume. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange believes this proposed change would still encourage OTP Holders to achieve Tier 4 albeit with increased Customer posted interest. The Exchange's proposed change to Penny Tier 4 to add a cross-asset component is designed to incentivize OTP Holders to execute volume on the Exchange's equities platform which would make the Exchange a more attractive execution venue.

Notwithstanding the proposed change to Penny Tier 4, the Exchange notes that OTP Holders are still eligible to qualify for the Penny Tier 4 per contract credit of per contract credit [sic] of (\$0.47) under the alternative (and unchanged) threshold, which requires that an OTP Holder execute at least 0.75% of TCADV from Customer posted interest in all issues. By continuing to provide such alternative methods to qualify for a Penny Tier, the Exchange believes the

opportunities to qualify for credits is increased, which benefits all participants through increased volume to the Exchange.

In connection with the proposed change to Penny Tier 4, the Exchange proposes to eliminate current Penny Tier 5, which provides a (\$0.48) per contract credit to OTP Holders that execute at least 0.22% of TCADV from Customer posted interest in all Issues, plus Executed ADV of 0.90% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market, or at least 0.75% of TCADV from Customer posted interest in all issues, plus at least 0.45% of TCADV from Market Maker Total Electronic Volume. The Exchange is eliminating Tier 5 because OTP Holders failed to consistently achieve this Tier and thus the incentive did not operate as intended. The Exchange notes that the proposed changes to Penny Tier 4 incorporates a cross-asset pricing component similar to the one being eliminated with existing Tier 5.

The Exchange proposes to modify current Penny Tier 7 by increasing both of the minimum alternative volume thresholds to achieve the same (\$0.50) per contract credit. First, the Exchange is proposing to require that OTP Holders execute at least 1.30% (up from 1.00%) of TCADV from Customer posted interest in all issues, or execute at least 1.00% (up from 0.80%) of TCADV from Customer posted interest in all issues, plus executed ADV of 0.30% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market.<sup>5</sup>

The Exchange believes the proposed change to Penny Tier 7, which increases the minimum volume required, would not discourage OTP Holders from directing volume to the Exchange because the Penny Tier 7 per contract credit of (\$0.50) is competitive with other options exchanges.<sup>6</sup>

The Exchange proposes to renumber current Penny Tiers 6 and 7 as new Penny Tiers 5 and 6, respectively.

Customer Incentive Program (the "Incentive Credits")

The Exchange also proposes modifications to the Incentive Credits, which enables OTP Holders to achieve one additional credit (to the Customer Posting Credits Tiers in Penny and Non-

<sup>5</sup> Regarding this alternative minimum threshold, the Exchange also proposes to make a non-substantive correction of a typographical error to eliminate an extraneous "ADV," which would add clarity and transparency to the Fee Schedule.

<sup>6</sup> See, e.g., BZX Options Fee Schedule, available at, [https://markets.cboe.com/us/options/membership/fee\\_schedule/bzx/](https://markets.cboe.com/us/options/membership/fee_schedule/bzx/) (providing a \$0.52 per contract credit to members that achieve Tier 4 of the Customer Penny Add Volume Tiers).

Penny Issues) if certain volume criteria and thresholds are met. The Exchange proposes to eliminate three of the existing Incentive Credits because such incentives failed to consistently incent OTP Holders to direct order flow to the Exchange. The Incentive Credits to be eliminated are:

- The additional (\$0.01) per contract credit for OTP Holders that executed at least 0.50% of TCADV from Customer posted interest in all issues, plus, an ADV from Market Maker posted interest in Penny Issues equal to at least 0.30% of TCADV; and
- The additional (\$0.03) per contract credit for OTP Holders that executed ADV of 0.90% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market; and
- The additional (\$0.03) per contract credit for OTP Holders that executed at least 1.50% of TCADV from Customer posted interest in both Penny and non-Penny Issues, plus Executed ADV of 0.10% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market.

The Exchange also proposes to add a new Incentive Credit which would provide an additional (\$0.03) per contract credit for OTP Holders that executed at least 0.30% of TCADV from Customer posted interest in all issues, not including Professional Customer interest, plus executed ADV of 0.60% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market. The proposed new Incentive Credit excludes Professional Customer interest and is designed to attract Customer order flow, which provides benefits distinct from Professional Customer volume. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange believes this proposed Incentive Credit would encourage OTP Holders to achieve this additional credit albeit with increased Customer posted interest. The Exchange's proposed inclusion of a cross-asset component is designed to incentivize OTP Holders to execute volume on the Exchange's equities platform (in addition to the options platform) which would make the Exchange a more attractive execution venue.

Customer Posting Credit Tiers in Non-Penny Issues (the "Non-Penny Tiers")

The Exchange proposes to modify the Non-Penny Tiers, which provide per

contract credits on executions of Customer posted interest in Non-Penny Issues, in several ways. First, the Exchange proposes to eliminate Tier B of the Non-Penny Tiers and the associated (\$0.94) per contract credit, which Tier includes the same minimum volume requirement as the to-be-eliminated Penny Tier 5 (*i.e.*, that an OTP Holder achieve at least 0.75% of TCADV from Customer posted interest in all issues, plus an ADV from Market Maker Total Electronic Volume equal to 0.45% of TCADV. [sic] Like the elimination of Penny Tier 5, the Exchange believes this change would remove an incentive that failed to consistently incent OTP Holders to direct order flow to the Exchange. In connection with this change, the Exchange proposes to rename the current Tier C as new Tier B and to offer a new Tier C.

Proposed Tier C of the Non-Penny Tiers would offer a (\$0.97) per contract credit to OTP Holders that execute at least 0.30% of TCADV from Customer posted interest in all issues, not including Professional Customer interest, plus executed ADV of 0.60% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market. Proposed Tier C, which excludes Professional Customer interest, is designed to attract Customer order flow, which provides benefits distinct from Professional Customer volume. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange's proposed inclusion of a cross-asset component is designed to incentivize OTP Holders to execute volume on the Exchange's equities platform. The Exchange believes this proposed Tier C would encourage OTP Holders to achieve this Tier albeit with increased Customer posted interest and would also encourage increased equities trading, which would make the Exchange a more attractive execution venue.

The Exchange also proposes to modify the minimum volume threshold required to achieve Tier F of the Non-Penny Tiers by offering a (\$1.02) per contract credit to OTP Holders that execute at least 1.00% (up from 0.80%) of TCADV from Customer posted interest in all issues, plus executed ADV of 0.30% ADV of U.S. Equity Market Share Posted and Executed on NYSE

Arca Equity Market.<sup>7</sup> The Exchange believes the proposed change to Non-Penny Tier F, which increases the minimum volume required, would not discourage OTP Holders from directing volume to the Exchange because the Non-Penny Tier F per contract credit of (\$1.02) is competitive with other options exchanges.<sup>8</sup>

The Exchange notes that an OTP Holder that qualifies for the new alternative volume threshold under Penny Tier 4 would also qualify for new Non-Penny Tier C as well as the new Incentive Credit as all three programs have the same minimum volume threshold. The Exchange notes that new Incentive Credit, which is a credit that is achieved in addition to credits associated with the Penny and Non-Penny Tiers, is designed to encourage OTP Holders that may already qualify based on the minimum options volume thresholds to also post and execute a certain amount of volume on the Exchange's equities trading platform, which would make the Exchange a more attractive execution venue for both options and equities.

The Exchange cannot predict with certainty whether any OTP Holders will avail themselves of the proposed changes to the Penny Tiers, Incentive Credits or Non-Penny Tiers. At present, whether or when an OTP Holder would qualify for the enhanced credit varies month-to-month. Thus, the Exchange cannot predict with any certainty the number of OTP Holders that may qualify for the proposed new qualifications, but believes that OTP Holders would be encouraged to increase volume to take advantage of the credit tiers, and also to increase participation through posted interest on the NYSE Arca Equity Market.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>10</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members,

<sup>7</sup> Regarding proposed Tier F, the Exchange also proposes to make a non-substantive correction of a typographical error to eliminate an extraneous "ADV, which would add clarity and transparency to the Fee Schedule. The Exchange also proposes a non-substantive change to Non-Penny Tier D to remove an extraneous comma, which would add clarity and transparency to the Fee Schedule.

<sup>8</sup> See, e.g., BZX Options Fee Schedule, *supra* note 6 (providing a \$1.00 per contract credit to members that achieve Tier 2 of the Customer Non-Penny Add Volume Tiers).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

## The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>11</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>12</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in April 2021, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>13</sup>

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. In response to this competitive environment, the Exchange has established incentives, such as the Penny Tiers, the Incentive Credits, and the Non-Penny Tiers.

The Exchange believes that the proposed modification to the Penny Tiers, including eliminating Penny Tier

<sup>11</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) ("Reg NMS Adopting Release").

<sup>12</sup> The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics>.

<sup>13</sup> Based on OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, *see id.*, the Exchange's market share in equity-based options increased from 7.46% for the month of April 2020 to 9.28% for the month of April 2021.

5 and modifying the minimum volume thresholds and qualifying criteria for Penny Tier 4 and current Penny Tier 7 (new Tier 6) are reasonably designed to continue to incent OTP Holders to increase the amount of Customer interest sent to the Exchange, especially posted interest. The proposed changes to the Penny Tiers exclude Professional Customer interest and are reasonably designed to attract Customer order flow, which is unique and provides benefits distinct from Professional Customer volume. An increase in Customer volume would create more trading opportunities, which, in turn attracts Market Makers. A resulting increase in Market-Maker activity may facilitate tighter spreads, which may lead to an additional increase of order flow from other market participants, further contributing to a deeper, more liquid market to the benefit of all market participants by creating a more robust and well-balanced market ecosystem.

As noted above, OTP Holders are still eligible to qualify for Penny Credit Tier 4 under the existing alternative (unchanged) qualification basis. By continuing to provide such alternative methods to qualify for a Penny Tier, the Exchange believes the opportunities to qualify for credits is increased, which benefits all participants through increased volume to the Exchange.

The proposed addition of the cross-asset component to Penny Tier 4 is designed to incent OTP Holders (and their affiliates) to transact more options and equities volume on the Exchange, which may result in an increase of volume and liquidity on both its options and equities platforms, which would benefit all market participants by providing more trading opportunities and tighter spreads, and may lead to a corresponding increase in order flow from other market participants.

The proposed changes to eliminate certain Incentive Credits and Non-Penny Tier B are reasonably designed to eliminate from the Fee Schedule incentives that did not consistently encourage OTP Holders to direct order flow to the Exchange. The proposed new Incentive Credit and new Non-Penny Tier C, which each include a cross-asset component, are reasonably designed to encourage OTP Holders (and their affiliates) to transact more options and equities volume on the Exchange, which would benefit all market participants by providing more trading opportunities and tighter spreads, and may lead to a corresponding increase in order flow from other market participants.

The Exchange believes that the proposed modification to the Non-

Penny Tier F is reasonably designed to continue to incent OTP Holders to increase the amount and type of Customer interest sent to the Exchange, especially posted interest. As noted above, an increase in posted Customer interest benefits all market participants.

The proposed new Incentive Credit has a minimum volume threshold identical to proposed Penny Tier 4 and Non-Penny Tier C and similarly excludes Professional Customer interest. This proposed Incentive Credit is reasonably designed to attract Customer order flow, which provides benefits distinct from Professional Customer volume. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange believes that this proposed Incentive Credit would encourage OTP Holders to achieve this additional credit albeit with increased Customer posted interest. The Exchange's proposed inclusion of a cross-asset component in the new Incentive Credit is designed to incentivize OTP Holders to execute volume on the Exchange's equities platform (in addition to the options platform) which would make the Exchange a more attractive execution venue.

To the extent the proposed rule change continues to attract greater volume and liquidity by encouraging OTP Holders (and their affiliates) to increase their options and equities volume on the Exchange in an effort to achieve higher credits through the Penny and Non-Penny Tiers (as well as one of the additional Incentive Credits), the Exchange believes the proposed change would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors.

The proposed non-substantive changes (*see supra* notes 5 and 7) are reasonably designed to add clarity and transparency to the Fee Schedule making it easier to navigate and comprehend.

The Proposed Rule Change is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of

its fees and credits. The proposal is based on the amount and type of business transacted on the Exchange and OTP Holders can opt to avail themselves of the credits or not. Moreover, the proposal is designed to incent OTP Holders to aggregate all Customer posting interest at the Exchange as a primary execution venue and to attract more posting interest on the NYSE Arca Equity Market. To the extent that the proposed change attracts more Customer posting interest to the Exchange and more posting interest on the NYSE Arca Equity Market, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution on both options and cash equities. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes it is not unfairly discriminatory to modify the Penny Tiers, the Incentive Credits, and the Non-Penny Tiers because the proposed modifications would be available to all similarly-situated market participants on an equal and non-discriminatory basis.

The proposal is based on the amount and type of business transacted on the Exchange and OTP Holders are not obligated to try to achieve the enhanced qualifications, nor are they obligated to execute posted interest. Rather, the proposal is designed to encourage OTP Holders to utilize the Exchange as a primary trading venue for Customer posted interest (if they have not done so previously) and more posting interest on the NYSE Arca Equity Market. To the extent that the proposed change attracts more Customer interest, including posted interest, to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and

open market and a national market system and, in general, to protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>14</sup>

*Intramarket Competition.* The proposed change is designed to attract additional order flow (particularly Customer posted interest and posted equity interest) to the Exchange. The Exchange believes that the proposed modification to the Penny Tiers, the Incentive Credits, and the Non-Penny Tiers would incent OTP Holders to direct their Customer order flow and their posted equity order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange and increased Customer order flow and posted equity order flow would increase opportunities for execution of other trading interest. The proposed modifications to the Penny Tiers, the Incentive Credits, and the Non-Penny Tiers would be available to all similarly-situated market participants that execute Customer posted interest (excluding Professional Customer interest), and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

*Intermarket Competition.* The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to

be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>15</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in April 2021, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>16</sup>

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees and credits in a manner that is competitive and designed to incent OTP Holders to direct trading interest (particularly Customer posted interest and posted equity interest) to the Exchange, to provide liquidity and to attract order flow.<sup>17</sup> To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar Customer posting credits, by encouraging additional orders to be sent to the Exchange for execution. The Exchange also believes that the proposed change is designed to provide the public and investors with a Fee Schedule that is clear and consistent, thereby reducing burdens on the marketplace and facilitating investor protection.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section

<sup>15</sup> See *supra* note 12.

<sup>16</sup> Based on OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, *see id.*, the Exchange's market share in equity-based options increased from 7.46% for the month of April 2020 to 9.28% for the month of April 2021.

<sup>17</sup> See *supra* notes 6 and 8.

19(b)(3)(A)<sup>18</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>19</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>20</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>19</sup> 17 CFR 240.19b-4(f)(2).

<sup>20</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>14</sup> See Reg NMS Adopting Release, *supra* note 11, at 37499.

printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2021-51, and should be submitted on or before July 6, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2021-12473 Filed 6-14-21; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92134; File No. SR-NASDAQ-2021-046]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Pricing Schedule at Equity 7, Section 114(f)

June 9, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 27, 2021, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Equity 7, Section 114(f) ("Pricing Schedule").

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/>

*rulebook/nasdaq/rules*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Equity 7, Section 114(f) applicable to the Designated Liquidity Provider ("DLP")<sup>3</sup> Program. The Exchange proposes to amend the rebates applicable for DLPs in Nasdaq-listed securities with monthly incentives that are directly tied to meeting market quality metrics ("MQMs"). Specifically, the Exchange proposes to (1) add Exchange Traded Fund Shares listed on Nasdaq pursuant to Nasdaq Rule 5704, Proxy Portfolio Shares listed on Nasdaq pursuant to Nasdaq Rule 5750, and Managed Portfolio Shares listed on Nasdaq pursuant to Nasdaq Rule 5760 to the list of securities that may be designated as a Qualified Security, as long as it has at least one DLP; (2) amend Equity 7, Section 114(f)(4) to revise the monthly performance criteria related to the specific rebates provided under Equity 7, Section 114(f)(5), as well as to address secondary DLPs ("Secondary DLPs"); (3) change the current schedule under Equity 7, Section 114(f)(5) from three tiers to five tiers, establish both standard

<sup>3</sup> Equity 7, Section 114(f)(2) defines a "Designated Liquidity Provider" or "DLP" as a registered Nasdaq market maker for a Qualified Security (defined below) that has committed to maintain minimum performance standards. A DLP will be selected by Nasdaq based on factors including, but not limited to, experience with making markets in exchange-traded products, adequacy of capital, willingness to promote Nasdaq as a marketplace, issuer preference, operational capacity, support personnel, and history of adherence to Nasdaq rules and securities laws. Nasdaq may limit the number of DLPs in a security, or modify a previously established limit, upon prior written notice to members.

rebates ("Standard Rebate") and enhanced rebates ("Enhanced Rebate"), as well as address Secondary DLPs; and (4) change the existing Additional Tape C ETP Incentives in Equity 7, Section 114(f)(5)(B), as well as add a new tier to the schedule.

###### Description of the Changes

The proposal amends the rebates applicable for DLPs in Nasdaq-listed securities with monthly incentives that are directly tied to meeting MQMs.<sup>4</sup> The Exchange believes that these changes will encourage DLPs to maintain better market quality in Nasdaq-listed securities, and, in particular, in lower volume securities where transaction-based compensation (*i.e.*, rebates) may not be sufficient. The Exchange currently offers a DLP Program, which applies to transactions in a Qualified Security<sup>5</sup> by one of its DLPs associated with its DLP Program market participant identifier ("MPID").

Add Exchange Traded Fund Shares, Proxy Portfolio Shares and Managed Portfolio Shares To List That May Be Designated as a Qualified Security

The Exchange proposes to amend Equity 7, Section 114(f)(1)(A) to add Exchange Traded Fund Shares listed on Nasdaq pursuant to Nasdaq Rule 5704,<sup>6</sup> Proxy Portfolio Shares listed on Nasdaq pursuant to Nasdaq Rule 5750 and Managed Portfolio Shares listed on Nasdaq pursuant to Nasdaq Rule 5760 to the list of securities that may be designated as a Qualified Security, as long as it has at least one DLP. Nasdaq Rule 5704 (Exchange Traded Fund Shares), Nasdaq Rule 5750 (Proxy Portfolio Shares) and Nasdaq Rule 5760 (Managed Portfolio Shares) were all fairly recently adopted and should be added to the existing list that already includes: Nasdaq Rule 5705—Exchange Traded Funds: Portfolio Depository Receipts and Index Fund Shares; Nasdaq Rule 5710—Securities Linked to the Performance of Indexes and Commodities (Including Currencies); Nasdaq Rule 5720—Trust Issued Receipts; Nasdaq Rule 5735—Managed Fund Shares; and Nasdaq Rule 5745—

<sup>4</sup> The Exchange is also making a technical change in the second sentence of Equity 7, Section 114(f)(5)(B) to change "Rebate" to "rebate".

<sup>5</sup> Equity 7, Section 114(f)(1) says a security may be designated as a "Qualified Security" if: (a) It is an exchange-traded product listed on Nasdaq pursuant to Nasdaq Rules 5705, 5710, 5720, 5735, or 5745; and (b) it has at least one DLP.

<sup>6</sup> The inclusion of Nasdaq Rule 5704 to the list of securities that may be designated as a Qualified Security is not a substantive change, but being added as a clarification because the securities listed under Nasdaq Rule 5704 are already covered by Nasdaq Rules 5705 and 5735.

<sup>21</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.